No. 82-2128

IN THE

Supreme Court of the United States

October Term, 1983

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., BELL TELEPHONE LABORATORIES, INC., NEW YORK TELEPHONE COMPANY, INC., NEW JERSEY BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE OHIO BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

Petitioners,

vs.

LITTON SYSTEMS, INC., LITTON BUSINESS TELEPHONE SYSTEMS, INC., LITTON BUSINESS SYSTEMS, INC., and LITTON INDUSTRIES CREDIT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY TO AMICUS CURIAE BRIEF OF THE UNITED STATES

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AMENDED RULE 28.1 STATEMENT

Because American Telephone and Telegraph Company (AT&T) and its affiliates were reorganized on January 1, 1984, petitioners amend their Rule 28.1 Statement as follows: Petitioners Western Electric Company and Bell Telephone Laboratories are wholly-owned subsidiaries of AT&T. AT&T has no parent company. In addition to other wholly-owned subsidiaries, AT&T has ownership interests in the Southern New England Telephone Company, Cincinnati Bell, Incorporated, and the Cuban American Telephone and Telegraph Company.

Petitioner New York Telephone Company is a wholly-owned subsidiary of NYNEX Corporation. Petitioner New Jersey Bell Telephone Company is a wholly-owned subsidiary of Bell Atlantic Corporation. Petitioner Southern Bell Telephone and Telegraph Company is a wholly-owned subsidiary of BellSouth Corporation. Petitioner Ohio Bell Telephone Company is a wholly-owned subsidiary of American Information Technologies Corporation. Petitioner Southwestern Bell Telephone Company is a wholly-owned subsidiary of Southwestern Bell Corporation. Petitioner Pacific Telephone and Telegraph Company is a wholly-owned subsidiary of Pacific Telesis Group. Petitioner Pacific Northwest Bell Telephone Company is a wholly-owned subsidiary of U S West, Inc.

NYNEX Corporation, Bell Atlantic Corporation, BellSouth Corporation, American Information Technologies Corporation, Southwestern Bell Corporation, Pacific Telesis Group, and U S West, Inc. are each separately owned companies; none has a parent company, and none has ownership interests in companies other than wholly-owned subsidiaries.

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PETITIONERS' REPLY TO AMICUS CURIAE BRIEF OF THE UNITED STATES

It should come as no surprise that the Department of Justice has opposed Bell's petition for certiorari. In *United States* v. *AT&T*, No. 74-1698 (D.D.C.), the Department vigorously contended that Bell's opposition to certification in 1973 was a "sham" and an antitrust violation, and it relied on the same Bell pleadings, speeches, and internal documents that Litton relies upon for its claim.[1] Judge Harold H. Greene held that this evidence is insufficient to constitute a sham, as a matter of law, and that the legal standards that the Department urged would "chill" and penalize constitutionally protected advocacy. *United States* v. *AT&T*, 524 F.Supp. 1336, 1361-64 & n. 110 (D.D.C. 1981). But this holding appears to have made the Department an even more determined advocate. Its Brief analyzes neither the appropriate legal standards nor the legal and economic importance of this case. Instead, it obscures the issues by repeatedly invoking conclusory statements and rhetoric from Litton's "version" of the facts—without even stating what it was that Bell actually said.

What is surprising about the Department's Brief, however, is that it takes these positions while *simultaneously confessing* that

[1] *Compare* Plaintiff's Memorandum In Opposition To Defendant's Motion For Involuntary Dismissal Under Rule 41(b), *United States* v. *AT&T*, No. 74-1698 (D.D.C.) (Filed Aug. 16, 1982), pp. 324-350, *with* Pet. App. 24a-33a, 47a-54a. The Department had worked closely with Litton's counsel and introduced evidence directly from the Litton case into the record in the Government case.

the Second Circuit's decision rests on a fundamental and systemic error: the premise that the jury was entitled to find that the FCC's "mandate in *Carterfone*" and *Hush-A-Phone* meant "that AT&T could not exclude 'any device'—a category clearly including telephone terminal equipment—absent a showing of actual harm." Compare Pet. App. 51a, with U.S. Br. 20-21 (conceding the correctness of Petn. 6-9). This confession of error highlights the legal, economic, and national significance of this case.

First, the error that the Department has confessed occurred only because the lower courts fundamentally misconceived the *Noerr-Pennington* doctrine and the First Amendment. The Department's own attempts to defend the judgment vividly reveal that if the distortion of constitutional principles is not corrected, advocacy that is at the heart of representative government will effectively be prohibited. Plenary consideration of this case would avoid these adverse effects and resolve the conflict among the courts of appeals. See Petn. 20-28.

Furthermore, the error that the Department has confessed has extraordinary and immediate consequences for the economy and for the administration of justice—all of which are ignored by the Department's Brief. The error produced a $276 million judgment. It can affect *twenty* pending cases and will clog federal courts with offensive collateral estoppel claims. See Petn. 28; Petr. Rep. Br. 10; Appendix A, *infra* (citing pending cases). The threatened aggregate liabilities are so great that they not only jeopardize ratepayers' interests, see NARUC Br. 1-2; they also cloud the just-completed reorganization of a vital national industry because the vast liabilities would be shared by each of the eight new entities created by the structural separation of the Bell System. See *id.; United States* v. *Western Electric Co.*, 569 F. Supp. 1057, 1069-78, (D.D.C. 1983), *aff'd*, 52 U.S.L.W. 3450 (Dec. 12, 1983). A decision permitting this case and the twenty pending cases each to be decided *free* of the error that the Department confesses and *free* of the misinterpretation of *Noerr-Pennington* would have tremendous national importance,[2] even apart from the

[2]The Department is in error in stating that Bell is seeking to "insulate" itself from liability for all the acts Litton alleged. U.S. Br. i. Bell is not

(Footnote continued on following page.)

long term importance of the legal questions. In any event, the Department having confessed that a fundamental error "influenced" the Second Circuit's decision to affirm this extraordinary judgment (Br. 21) and Bell having argued that this false premise vitiates the judgment (Petn. 3-4, 17-19, 27, 30), the Court, at a minimum, should vacate the Second Circuit's judgment and remand for reconsideration in light of the error that the Department has confessed.

I. The Confession Of Error Vitiates The Judgment.

Although the Department devotes most of its Brief to defending the finding that Bell's opposition to certification was a sham, it also contends (Br. 11) that the finding that Bell filed its PCA tariff in bad faith in 1968 is an independent, "alternative basis" for the judgment. It claims (Br. 21) that this finding and the $276 million judgment can be sustained on the ground that Bell knew the PCA was "not necessary to prevent harm to the Bell network," despite the confession of error. Neither claim withstands analysis.

First, this judgment rests exclusively on the finding that Bell opposed certification in bad faith in 1973, for that was the basis for Litton's claim of antitrust injury.[3] The testimony of Litton's President, its jury argument, its business plan, and its damages evidence all made it explicit that Litton's claim at trial was that it was driven from the relevant markets by Bell's announcement in 1973 of its opposition to an FCC-administered system of standards. See Pet. App. 21a, 31a; Petr. Rep. Br. 2-4. Similarly, the terms of the jury verdict and the conditions under which it was entered demonstrates that the jury accepted Litton's argument

(Footnote continued from preceding page.)
contending it is immune from liability and is not seeking the entry of judgment in its favor. The case should be retried free of the errors which infect the present judgment. See Petn. 16 n. 10.

[3]The Department's arguments overlook that it is no longer prosecuting *United States* v. *AT&T*. Whereas antitrust injury need not be proved a Government action for equitable relief, compare *United States* v. *AT&T*, *supra*, 524 F.Supp. at 1344-45, it is an essential element in a private action for money damages and determines the conduct for which damages may be awarded. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977).

and found that it was Bell's opposition to certification in 1973 that injured and damaged Litton, not the filing of the tariff in 1968. *Id.* at 4.[4] In any case, no one disputes that, at the very least, some portion of the massive judgment rested upon, or was tainted by, the jury finding that Bell's participation in the national debate in 1973 was unlawful. The judgment, accordingly, cannot be affirmed without ruling on the protected character of Bell's opposition to certification. See *Mt. Healthy City School Dist. Bd. of Ed.* v. *Doyle*, 429 U.S. 274 (1977); *Street* v. *New York*, 394 U.S. 576, 586-90 (1969).

Second, in any event, the Department's confession of error vitiates the jury's findings on both the protected character of Bell's opposition to certification in 1973 and the lawfulness of the initial filing of the PCA tariff in 1968. The confession of error eliminates the very premise of the claims that Litton submitted to the jury on each issue.

At every stage of this litigation, Litton has stated that its claims depend on a single premise about the regulations existing between 1971 and 1974: that Bell's *lawful* monopoly included only central switching systems and the wires that connect them to its customers' premises and that its monopoly over telephone instruments was then *unlawful*. See Resp. Opp. 2. In Litton's view, the customers' "jack" or "plug" was then the line that divided the regulated telephone monopoly from the competitive aspects of telecommunications. Litton assumes that *Hush-A-Phone* and *Carterfone* not only make this explicit, but also provided that no restriction on customer-provided network control signalling units would be valid unless Bell had actual incontrovertible proof that technical standards could not adequately protect the network from harm. Resp. Opp. 3. Under Litton's version of the then

[4]This is just common sense. The filing of tariff could not have driven Litton from the PBX and key system market; the tariff *opened* the markets to competition and allowed Litton's entry in 1971. Moreover, Litton had wanted the PCA tarifff to *remain* in effect until 1973 and then be replaced by an FCC-administered system of standards established in a rulemaking proceeding (*not* by a carrier-administered system established by a tariff filing). See Pet. Rep. Br. 4.

existing regulations, Bell could not justify or even advocate a PCA requirement on *any other ground.* Once this version of the regulations is adopted, moreover, it was, *a fortiori*, that Bell's opposition to certification and its filing of the PCA tariff could be found an antitrust violation; Bell *never claimed* it had incontrovertible scientific proof of harm, but advocated the PCA for other reasons.[5]

By confessing that neither *Carterfone* nor *Hush-A-Phone* gave customers a right to provide their own "harmless" telephone instruments and that it was then an open question whether customers would ever be given that right, the Department has eliminated the whole premise for Litton's judgment. The State regulations that *included* telephone instruments in the franchised monopolies had, the Department admits, simply not been preempted by *Carterfone* or *Hush-A-Phone.* The line that established the outer limit of Bell's lawful monopoly had then been drawn at the telephone instrument, not the jack.[6]

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[5]Bell had argued that there was a *potential* for harm—which the National Academy of Sciences had found and which all conceded, *including* Litton. See Petr. Rep. Br. 5 n. 8. Bell had based its opposition to certification and advocacy of the PCA alternative almost exclusively on grounds that were wholly unrelated to whether adequate standards could be drafted. In Bell's FCC pleading that opposed certification, 246 of the 251 pages were devoted to issues *other* than whether customer provided equipment would harm the network. See Petn. 11-12.

[6]It is the States who issue the franchises and initially define them. See Petn. 4-5, 7-12. Because the state definitions of the scope of the monopoly are valid unless and until preempted by federal authority, a determination of where the line has been drawn at any particular time depends on the extent to which state definitions had been preempted.

There have been four such definitions during this century. (1) The States initially defined the monopoly as the telephone instrument *and* anything attached to it. Petn. 4-5. (2) *Carterfone* redefined the monopoly as including telephone instruments, but as *excluding* equipment attached to them. Petn. 5-6. (3) The States all initially accepted Bell's post-*Carterfone* tariffs, which redefined the monopoly as including the network control signalling unit, but not the telephone instrument. When some States proposed rolling back this definition, the FCC, in 1974, decided it could and would preempt the state law definitions to the extent that they were inconsistent with those tariffs. See *Telerent Leasing Corp.*, 45

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The Department's attempt to defend the judgment on the ground that Bell knew that its adoption of the PCA requirement in 1968 was not "necessary to prevent harm to the Bell network" is a *non sequitur*. Its confession of error establishes that Bell was then acting within its lawful monopoly. It could have continued to bar its customers from providing their own telephone instruments but *voluntarily* opened the PBX and key system markets to competition. As even the Department acknowledges (Br 21 n.21), Bell was entitled to take into account established regulatory policies *unrelated* to the risks of harm in deciding not voluntarily to relinquish more of its monopoly. There clearly were such regulatory justifications for the PCA requirement in 1968. It would have flatly contravened a host of economic, social, and other longstanding regulatory policies of the States—which had not then been preempted—if Bell had permitted its customers to provide their own network control signalling units. Moreover, the only alternative to the PCA that *Bell* could have adopted by tariff was a *carrier*-administered system of standards, but that would have produced enormous antitrust and regulatory problems—as the FCC's *current* regulations demonstrate.[7] See also Radiant Burners, Inc. v. *Peoples Gas, Light, & Coke Co.*, 364 U.S. 656 (1961). In short, even if the finding that Bell filed the PCA tariff in bad faith could support the judgment, the finding is not sustainable; the jury instructions were erroneous.[8] Petn. 16, 27-28.

(footnote continued from previous page)
F.C.C.2d 204 (1974). Its authority to do so was upheld in a 2-1 decision in *North Carolina Utilities Comm'n.* v. *FCC*, 537 F.2d. 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976). (4) Finally, in 1976, the FCC again preempted the States and redefined the monopoly as including the "jack" or "plug," but as excluding network control signalling units. Resp. App. 76a.

[7]When the FCC did preempt the States and adopt the jack as the boundary between the monopoly and competitive aspects of telecommunications in 1976, it did so *only* with respect to equipment that *it* had certified as safe. It prescribed the use of PCAs with all unregistered equipment (irrespective of any proof of actual harm). Petn. 13-14. To this day, the FCC has refused to require carriers to interconnect any equipment that the *FCC* has not certified as safe.

[8]The Department's reliance (Br. 16-17) on Judge Greene's decision on this point is mystifying. He held only that the Department had made out

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Finally, the Department's confession of error even more clearly demonstrates the conduct that is the basis for the judgment—Bell's opposition to certification in 1973—cannot be condemned as a "sham" simply because Bell lacked strict proof of actual harm. *Noerr* teaches that Bell would have had a constitutional right to defend its monopoly against federal preemption in a legislative rulemaking proceeding on any ground whatsoever, even if the regulatory framework had been as Litton claims. Because the Commission's *Notice of Inquiry* made it explicit that it believed that certification might not be in the public interest *even if* a standards program could adequately protect the network, see Pet. App. 177a, Bell plainly had a right to base its opposition on such traditional public interest concerns as the effects of certification on residential telephone rates and the cost and quality of telephone service. See Petn. 10-12.

II. Bell's Opposition To Certification Could Not Be Condemned As A Sham Under This Court's Decisions And Those Of Other Courts Of Appeals.

The Department's alternative defense of the verdict—that Bell's opposition to certification was a sham—demonstrates the importance of plenary review. The Department is urging a fundamental transformation of *Noerr-Pennington* that would profoundly inhibit advocacy of issues of great public importance and strike at the very heart of representative government.

The error that the Department has confessed occurred because the Second Circuit did not determine the meaning of the existing regulations itself, but held that a jury could permissibly adopt the erroneous Litton "version." See Petn. 24-25. But the Department fails to acknowledge the full dimensions of this error; it rested on a fundamental misconception of the First Amendment. The First Amendment requires a careful *judicial* assessment of public statements to determine "whether they are of a character which the principles of the First Amendment protect," *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946), and present questions of law

a prima facie case that the filing of the PCA tariff was unlawful, and he had *reserved* the issue of the significance of the regulatory justifications for Bell's conduct. See *United States* v. *AT&T*, *supra*, 524 F.Supp. at 1348-52 & 1357-60.

for the court. *Connick* v. *Myers*, 103 S. Ct. 1684, 1690 n. 7, 1692 n. 10 (1983); see Petn. 22 nn. 14-15. The protected character of speech is not an ordinary jury question.

Yet the Department defends the verdict by simply stating that a jury could have accepted Litton's rhetoric and labeled Bell's opposition to certification "baseless," and a "misrepresentation." The Department gives these terms no content and would provide no meaningful limits on a jury's discretion to condemn advocacy on impermissible grounds. The Department's notion is that whether these labels can be affixed to particular advocacy is simply a matter for the trier-of-fact to determine on the basis of some unstructured consideration and weighing of (1) the likelihood that the advocacy would be successful (Br. 11); (2) the extent to which the factual premises of the position were strictly accurate and scientifically verifiable (*id.* 14); and (3) the competitive consequences of the position that has been urged (*id.* 9). But to give the sham exception such indeterminant and elastic meaning will inevitably inhibit constitutionally protected speech and is flatly inconsistent with *Noerr*.

The Department's arguments that Bell's advocacy was properly found to be "baseless" vividly demonstrate the point. In opposing certification, Bell advocated a position that the Commission *stated it was considering* and upon which it expressly invited comment in the very *Notice of Inquiry* to which Bell was responding —maintenance of the *status quo*. See Petn. App. 184. Bell's position was further supported by two FCC Commissioners, the Federal-State Joint Board that sat as the Administrative Law Judge, state commissions, and numerous other representatives of the public interest. Bell's concerns were so widely shared that no one could have believed at the time that Bell's position was "baseless" or certain to be rejected. Indeed, intervening events have demonstrated that the States and Bell were right—and the FCC was wrong—about the principal issue in this public debate: whether the FCC's new policies would lead to sharp future increases in local rates.[9]

[9]See, *e.g.*, *Universal Telephone Service Preservation Act of 1983: Joint Hearings before the Senate Committee on Commerce, Science,*

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The Department ignores the objective reasonableness of Bell's position and, instead, extrapolates from internal Bell documents to infer that Bell knew the PCA was indefensible and that certification was inevitable. As Judge Greene held, the ambiguous statements from the internal Bell documents are insufficient as a matter of law to convert Bell's objectively reasonable advocacy into a sham. They are from documents discussing *different* proposed PCAs or *different* tariffs and pertain to *one side* of an internal debate occurring 2 to 5 years *before* the FCC issued its Notice of Inquiry in 1973. Petr. 24-26; Petr. R. Br. 6 n.10. In contrast, the record shows that, at the time Bell filed its comments, most of its management believed that, while difficult, it and the States could prevail before the FCC, especially if the public could be led to understand the consequences of certification. Fundamental constitutional values would literally "go for naught" if advocacy of public interest questions could be converted into an antitrust violation on such flimsy grounds. See *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 138-39 (1961).

Significantly, the Department does not attempt to explain how what Bell actually said could possibly constitute a "misrepresentation" that would subvert the administrative process. What Bell did was *truthfully* to disclose the results of studies and state an opinion that this evidence was "sufficiently consequential" to be circumstantial evidence that increased interconnection of customer-provided equipment had an adverse effect on service quality. As Judge Greene held, such statements cannot be a sham. Where, as here, the background facts are disclosed, nothing has been "concealed," nothing can go "unnoticed," and the integrity of government processes cannot be subverted. *United States* v. *AT&T, supra*, 524 F.Supp. at 1363–64. In contrast, the implications of the Department's position are simply staggering. It would apparently impose an affirmative duty on all regulated firms to make no statements that are not scientifically verifiable—even in *legislative* rulemaking proceedings—and to act as insurers of the accuracy of everything that they say. See U.S. Br. 14. This rule will expose future participants in public debates to crippling antitrust judgments where, as here, what is said is reasonable at the

***and Transportation and the House Committee on Energy and Commerce*, 98th Cong., 1st Sess., (July 28-29, 1983).**

time and not contradicted by any known facts. The inevitable result would be to inhibit the flow of information and ideas, prevent ordinary statements of opinion, and impair representative government itself.

The Department's argument (Br. 11-12 & n. 12) that antitrust laws *should* have inhibited Bell's advocacy before the FCC in 1973 and *should* have prevented John deButts from giving the public speech in which Bell instituted its campaign to educate the public on the effects of certification is supremely ironic. The Bell System is being criticized by the public today because it did not say *more* to alert the public as to consequences of the competitive policies that the FCC began to pursue in the early 1970s. Yet if it had been clear in 1973 that Bell's advocacy would be transformed into a sham and penalized with a $276 million judgment, Bell would not have said anything at all. How can such a result be squared with the First Amendment?

CONCLUSION

The petition for a writ of certiorori should be granted; alternatively, the judgment should be vacated and the case remanded for reconsideration in light of the Department's confession of error.

Respectfully submitted,

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January 5, 1984

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APPENDIX

There are now 20 pending cases that present the identical claims as this case:

General Dynamics Corp. v. *AT&T*, No. 82-C-7941 (N.D.Ill.).

Glictronix Corp. v. *AT&T*, No. 82-4447 (D.N.J.).

Gregg Communication Systems v. *AT&T*, No. 82-C-6291 (N.D.Ill.).

Jack Faucett Assoc., Inc. v. *AT&T*, No. 81-1804 (D.D.C.) (and four consolidated cases).

KWF Industries, Inc. v. *AT&T*, No. 83-0431 (D.D.C.).

Phonetele, Inc. v. *AT&T*, No. 74-3566-FW (C.D.Cal.).

Rice International Corp. v. *AT&T*, No. 82-2573 (S.D.Fla.).

Selectron, Inc. v. *Pacific Northwest Bell Telephone Co., et al.*, No. 76-965-BE (D.C.Ore.).

DASA Corp. v. *AT&T*, No. 83-2695 (E.D.Pa.).

Interconnect Resources Corp. v. *AT&T*, No. 83 Civ.P. 7002 (KTD). (S.D.N.Y.).

American Business Communications Inc. v. *AT&T*, No. 83-1261 (D.Ore.).

Am/Comm Inc. v. AT&T, Civ. Action 83-4122 (E.D.Pa.) (and two consolidated cases).

Metropolitan Interconnect Telecommunications Corp. v. *AT&T*, 83 Civ. 6161 (ADS) (S.D.N.Y.).

Design Communications, Inc. v. *AT&T*, No. 83-2076-Civ.-SMA (S.D.Fla.).